Supreme Court, U. S.
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No. 75-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DIFCO LABORATORIES, INC., Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATUTES

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QUESTION PRESENTED

Whether acceptance by the Employer of the Union's no strike assurances at the expiration of the collective bargaining agreement constituted an oral extension of a no-strike clause so as to render a subsequent strike by unit employees unprotected in view of no finding that independent unfair labor practices were committed by the Employer?

STATUTES INVOLVED

The relevant statutory provisions are Sections 7, 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act, as amended, (29 U.S.C. Sec. 151, et. seq.).

STATEMENT

Difco Laboratories, Inc., herein called Employer, is a Michigan Corporation engaged in the manufacture, sale and distribution of biological and bacteriological media and related supplies. (Appendix B infra., p. 13).

The Employer and Local 246, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), herein called "Union", have been parties to collective bargaining agreements covering the employees for several years. Said contracts have encompassed a single bargaining unit of employees employed by the Employer at both its Detroit and Romulus, Michigan Plants. (Appendix B, infra. p 11).

The then current contract was set to expire on August 31, 1973. A contract ratification meeting was conducted by the Union. Ratification failed, and, thereafter, on August 31, 1973, the respective bargaining teams met. Present was a Romulus Plant representative, who was on the Union's bargaining team. (Record p. 41). The Employer, interested in whether its operations could continue in view of the perishable materials needed for and utilized in its production process, asked whether the Employer had been struck. The Union, through its agents, stated flatly that no strike vote had been secured and assured the Employer that there would be no strike without the Employer receiving adequate notice to permit an orderly shutdown of operations. (Appendix B, infra., p 14). With regard to the Employer's operations, the N.L.R.B. itself noted that in 1967 there was a strike during contract negotiations and, employees at both plants went out leaving the production process so that a great deal of meat and product in process were spoiled, costing the Company considerable sums of money. (Appendix B, infra., p 14).

With regard to the no-strike assurance Lois Lessnau, President of the Union, testified that assurance against the recurrence of the 1967 strike was sought by the Employer due to the perishable nature of its operations and she agreed that the 1967 strike resulted in destruction of perishable goods. (Record p. 38). Moreover, at (Record p. 40) Lessnau was asked:

> "Q. The understanding, assurance was given there would be an orderly shutdown so the occurrence that happened in 1967 wouldn't happen again, right?"

Lessnau's response was:

> "A. Yes, Okay."

Further, at (Record p. 41) the question and response by Lessnau was as follows:

> "Q. So while the contract itself was not extended, and to sort of paraphrase, everything to put it in a conclusion, assurances were given with regard to strike — is that correct?"
>
> "A. Right."

Contrary to the Board's conclusion (Appendix B, infra., p.22) there was no record testimony that there was any agreement or understanding to limit the no-strike extension solely or "mainly" to the Detroit facility.

Based upon the aforementioned assurances which were accepted by the Employer, the Employer maintained perishable products at the Romulus Plant in preparation for resumption of operations after the 1973 Labor Day weekend (Record p. 93).

On September 6, 1973, the bargaining unit employees at the Romulus, Michigan plant struck. As noted above a Romulus plant employee was on the Union's bargaining team and was present when the no-strike assurance was given by the Union and accepted by the Employer.

Upon arriving at the Plant, Union agents informed strikers in part that the strike was unauthorized (Record p. 46).

On September 7, 1973, the strikers returned to work. All of the strikers were given three (3) days suspensions by the Employer and disciplinary notices were placed in their files. Additionally, all strikers were denied holiday pay for Labor Day, 1973. (Appendix B, infra., p 18).

The N.L.R.B. found the strike to be protected in that there was no extension of a no-strike clause and assessed blame for the strike equally upon the Employer and the Union. (Appendix B, infra., p22). The N.L.R.B., however, did not find that the Employer committed any unfair labor practices separate and apart from its ultimate conclusion.

REASONS FOR GRANTING THE WRIT

It Is The Employer's Contention That It Had The Right To Discipline The Strikers In View Of The No Strike Assurances Given By The Union, The Acceptance Of Which By The Employer Constituted An Oral Extension Of The Expired Contract's No-Strike Clause And In View Of No Finding Below That The Employer Committed Separate And Independent Unfair Labor Practices Of A Nature To Warrant Unilateral Abrogation Of The No-Strike Assurance.

The Employer submits that this case is controlled by the principles set forth in *The Arundel Corporation*, 210 N.L.R.B. No. 93 (1974), and *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

The tribunals below erred as a matter of law in their conclusion that an extension of a no-strike clause was not present in this case. That conclusion was based upon the premise that in *Arundel* the N.L.R.B.'s General Counsel and the parties stipulated that the no-strike clause was extended while such stipulation was absent herein. (Appendix B, infra. p. 22).

It is submitted that save the stipulated agreement in *Arundel*, the facts in the case at bar and *Arundel* are identical.

In *Arundel*, the parties were signatories to a contract which called for termination on a given date and which contained a no-strike no-lockout clause. At a time immediately prior to the contract's termination date, the Union verbally assured the Employer that no strike would occur. Subsequent to the termination date, the employer's attorney left for vacation and secured verball assurance from the Union that there would be no strike at least until the attorney returned. However, during this period the Union struck.

The N.L.R.B. found that the strike in *Arundel* commenced as an unprotected strike in violation of the parties' verbal no-strike extension agreements set forth above. In fact, the N.L.R.B. found the strike never did become protected. A dismissal of the Complaint ensued. Attention is also directed to Member Jenkins' dissent in *Arundel*, wherein he stated:

> "General Counsel concedes, and I agree that the Union *voluntarily* obligated itself to be bound by the no-strike clause in the collective-bargaining agreement first until the meeting of July 6 and later until July 23, the date on which the Respondent's attorney was due to return from vacation. As a consequence, the General Counsel admits, and I again agree, that when the Union commenced its strike on July 11, it was acting *in violation of the no-strike clause* in the collective-bargaining agreement and *thereby was engaging in an unprotected activity*." (emphasis added)

It is submitted that what was conceded in *Arundel* is identical to what occurred in the case at bar and that the tribunals below misapplied *Arundel* on the erroneous distinction that the parties therein stipulated to a fact not stipulated to in this case, but which was nevertheless factually established by the Union's own testimony. In fact, the majority in *Arundel* nowhere indicates that absent the stipulation they would not have found an extension of the no-strike clause therein and Member Jenkins' dissent clearly sets forth that he found such extension separate and apart from any stipulation.

In sum, the tribunals below erred as a matter of law by ignoring prior precedent and finding that there was no extension of the no-strike clause in this case.

In *Mastro Plastics*, this Honorable Court found that qualification to a union strike waiver in essence related to commission of flagrant unfair labor practices by an employer. No such flagrant or horrendous contact was alleged or found by either the N.L.R.B. or the Court of Appeals in this case. In fact no independent unfair labor practices were found herein.

In sum, the Union's unqualified no strike assurances, the acceptance of said assurances by the Employer and the absence of a finding that flagrant or even independent unfair labor practices occurred in this case renders the employee's strike activities unprotected. Accordingly, as a matter of law, no violation of Section 8 (a) (1) or 8 (a) (3) of the Act occurred relative to the Employer's disciplining of its striking employees.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Detroit, Michigan 48226

Dated: 1/7/76

APPENDIX A

No. 75-1357

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

DIFCO LABORATORIES, INC., Respondent

Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed October 13, 1975

Before: EDWARDS, CELEBREZZE and McCREE, Circuit Judges.

On receipt and consideration of the briefs and records in the above-styled case; and

Finding in the entire record substantial evidence to support the findings of fact and conclusions of law arrived at by the National Labor Relations Board,

The Board's order[1] is hereby enforced.

Entered by order of the Court

_____

Clerk

[1] The Board's order is reported at 216 N.L.R.B. No. 13 (1974).

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CASE 7-CA-10930

DIFCO LABORATORIES, INC.

AND

JUDITH M. SMITH

DECISION AND ORDER

On August 21, 1974, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, General Counsel and Respondent filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Difco Laboratories, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take

1 No exceptions were filed to the Administrative Law Judge's treatment of the *Collyer* issue. Acting Chairman Fanning would not in any event defer to arbitration for the reasons set forth in his dissenting opinions in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and related cases.

the action set forth in the said recommended Order except that the attached notice is substituted for the Administrative Law Judge's Appendix B.

Dated, Washington, D. C., January 7, 1975.

John H. Fanning, *Acting Chairman*

Ralph E. Kennedy, *Member*

John A. Penello, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered evidence, it has been found that we violated the Act. We have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT suspend employees or place disciplinary notices in their personnel files or discriminatorily refuse to pay them holiday pay if they engage in a lawful strike.

WE WILL NOT in the same or any similar manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL make the following striking employees whole for the loss of pay they suffered as a result of their suspension and pay each of them the holiday pay due, both with interest:

Florence Antczak	Gary Lumbert
Deborah Barnes	Stella Lupinski
Robert Boudreau	Gene Moore
Steven Briesch	Phyllis Mullinis
Maureen Buckner	Robert Peterson
Clarence Burton	Patty Rodrigres
Patricia Dangler	Doris Rudolph
Vivian Dupuy	Joseph Schiros
Dora Dyer	Judith Smith
Vivian Fosgate	LaRoma Stout
David Gennero	Doris Voytovich
Charlene Hansen	Albert White
Mary Lawrence	Sherry Whitted

Raymond Lock

WE WILL remove and destroy the disciplinary notices regarding the strike placed in the personnel files of the striking employees.

DIFCO LABORATORIES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313-226-3200.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CASE 7-CA-10930

DIFCO LABORATORIES, INC.

AND

JUDITH M. SMITH

***Charles F. Morris, Esq.*, of Detroit, Mich., Counsel for the General Counsel**

***Stewart J. Katz, Esq.*, of *Keller, Thoma, Toppin & Schwarze* of Detroit, Mich., for Respondent.**

Judith M. Smith, per se.

DECISION

Statement of the Case

JOHN M. DYER, Administrative Law Judge: On February 19, 1974[1] Judith M. Smith filed a charge against Difco Laboratories, Inc., herein called the Company or Respondent, alleging that the Company had discriminated against employees by denying them holiday pay and by suspending them following a strike. In a Complaint issued by the Regional Director on April 9, 1974, it is alleged that Respondent violated Section 8(a)(1) and (3) of the Act, both by denying holiday pay to those who engaged in a strike on September 6 and by suspending those strikers for a 3-day period, and by inserting disciplinary slips in their personnel files.

Respondent's April 19, 1974 Answer, admitted the requisite commerce and jurisdictional allegations and that Local Union No. 246 of the International Union of United Automobile, Aerospace & Agricultural Implement Workers of America, herein called the Local or the Union, is the exclusive representative of the employees in a unit of production and maintenance employees of Respondent's two plants located in Detroit, and Romulus, Michi-

1 Unless specifically stated otherwise, all events herein took place during 1973.

gan. In an amended Answer to the Complaint, filed by its counsel on June 17, 1974, Respondent admitted that various employees at its Romulus plant went on strike on September 6, and returned to work on or around September 7, and that the employees in the production and maintenance unit of its two plants ratified a new collective bargaining agreement containing union security provisions which became effective on September 10, 1973, with a termination date of March 14, 1976. Respondent denied the remainder of the allegations of the Complaint or that it had in any way violated the Act. In its amended Answer, Respondent asked that the matter be deferred to arbitration processes as provided in the collective bargaining agreements referred to in the Complaint, in accordance with the Board's decision in *Collyer Insualted Wire*, 192 NLRB No. 150.

One of the principal issues between Respondent and the General Counsel, is the status of the prior contract. General Counsel alleges that Respondent's prior contract expired at 12:01 a.m., September 1, and that accordingly there was a hiatus between that contract and the new agreement which became effective on September 10. Respondent's Answer denies this and Respondent takes the position that guarantees were extended to it that the Union would not strike in the interim and that accordingly the strike of September 6 was in derogation of such agreements and was unlawful.

There are some conflicts in the testimony concerning what was said on several points, but in essence there is agreement as to the events. I have concluded that there was no extension of a no-strike clause and that there was no contract in existence between September 1, and September 10 governing the conduct of the parties and that basically the parties so agree. I further find that the strike was not unlawful and that the penalties exacted by Respondent are violative of Section 8(a)(1) and (3) of the Act because they were imposed for protected concerted activities and must be abrogated and the discriminatees made whole.

At the trial of this matter held in Detroit, Michigan, on June 18, 1974, all parties were afforded full opportunity to appear, to examine and cross-examine the witnesses and to argue orally. General Counsel and Respondent have filed briefs which have

been carefully considered. On the entire record in this Case I make the following:

FINDINGS OF FACT

I.

Business of the Respondent and the Labor Organization Involved

Respondent is a Michigan corporation with its principal office and place of business in Detroit, Michigan, and a smaller facility in Romulus, Michigan, which is the only plant involved in this proceeding. Respondent is engaged in the manufacture, sale and distribution of biological and bacteriological media and related supplies and during the past year received goods and materials valued in excess of $50,000 directly from points outside the State of Michigan and during the same period sold and distributed products valued in excess of $50,000 directly to points outside the State of Michigan.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find, that the Union herein is a labor organization within the meaning of Section 2(5) of the Act.

II.

The Unfair Labor Practices

A.

Background and Facts

Approximately 100 people are employed at the Company's Detroit plant where the principal manufacturing process takes place. Basically the Company starts with frozen meats which are brought from an outside cold storage plan and are thawed, then ground and cooked in a solution which is described as a soup, and then the soup is purified, concentrated and dried and becomes a stable powder product. The Company also uses some vegetable products in the same manner. Its finished product is used to grow bacteria and is termed a diagnostic reagent. As thawing and ground meat and in its liquid soup form, until it is dried, these

materials are subject to spoilage if left unattended. The process takes from 48 to 72 hours to complete to the powder form. The stable powder is then shipped to the Romulus plant which is sometimes called the Metro plant since it is near the Detroit Metropolitan Airport. The Romulus plant employs approximately 30 employees and has two departments: the warehouse and storage function where the finished products are stored (some refrigerated) and shipped and a manufacturing facility for preparing a liquid diagnostic reagent. In this process which takes less than a day the powder is placed in a solution of distilled or iodine water and is then packaged in bottles and sterilized, and again becomes a stable product.

The Company and the Union have a history of negotiations which usually culminated in 3-year contracts. In 1967 there was a strike during contract negotiations and, according to Respondent, employees at both plants went out leaving the production process so that a great deal of meat and product in process were spoiled, costing the Company considerable sums of money.

The parties were negotiating in August 1973, and the negotiating teams had reached an agreement subject to ratification by the employees. Provisions were made for the employees to come to work early on August 31, so that they could leave the plan early and vote on ratification. The employees did not ratify the agreement and Local Union President Lessnau and Union Representative Hank Hurlbert and three other members of the Union negotiating committee then met with Frank Klemz who is the director of materials and head of the Company negotiating committee. After asking if there was a strike pending, Klemz mentioned that the Company wanted to be assured of continuous operations because of the problem of spoilage which they had suffered in 1967. Union Representative Hurlbert said that there had been no strike vote and no strike was pending and that a strike vote would have to be taken and sanction received from the UAW before the Union could conduct a strike. He said that the Company would have adequate notice of a strike since notice would have to be given for a meeting of employees to vote on a strike and after such a vote the local would have to get ther international's sanction which would mean that the Company would have several days notice before a strike could commence.

There was no written extension of the contract no-strike clause nor was there a specific oral extension of it. The Union told the Company that it would have adequate notice to prepare itself for a strike if a strike were to be called by the Union. The Company refers to this as a guarantee that it would not be faced with the 1967 situation. In his later testimony Mr. Klemz agreed that the Union was to give him adequate notice of a strike.

Klemz testified that on Tuesday, September 4, a statement prepared by him was read by the supersisors to all employees. The message was to the effect that the Company was conducting business as usual and though disappointed at the failure to ratify the contract, negotiations would continue and that holiday pay would be paid provided there were no problems among the employees. Lois Lessnau, the Union president and an employee at the Detroit plant, stated that in regard to holiday pay the message was that it would be paid if there were no stoppages or walkouts. Klemz read this statement to the employees in her department and she asked him whether everybody was going to hear the same thing and he responded yes.

Robert Peterson testified that at the Romulus plant, foreman Dick Colson read from a sheet of paper, telling the employees that if they walked out or if there was a wildcat strike it would jeopardize their holiday pay.

There is some dispute regarding what was said about a hospitalization program and whether it would expire or not, but it is not necessary to resolve that particular issue in deciding the issues in this case.

On Thursday, September 6, Peterson, together with two other employees, had a conversation with Foreman Dick Colson at the Romulus plant. Colson said that the Local shop steward wanted to call the main plant and find out from Union President Lois Lessnau when the bargaining would continue between the Company and the Union. Colson said that they did not have a union at that time and did not have any representation and told them to get back to work or they would be fired.

Judy Smith, the Charging Party and a union officer, stated that later that morning she saw people starting out of the plant and had a discussion with her supervisor, Timothy Hushen, as to what

was going on. Hushen said that the shop steward had asked permission to call the other plant and that Foreman Colson would not let him do so and the people started to walk out and then Colson changed his mind and allowed him to call the other plant to find out what was going on concerning when negotiations would be held.

Klemz testified that Colson called him that morning prior to 9 o'clock and asked whether it was all right to allow the shop steward to call the Union president to find out when the next negotiation meeting would be held, that the people were asking questions about it. Klemz told Colson it would be all right and started to talk to the shop steward about it when Colson grabbed the telephone back and said that people were walking out of the plant. Klemz and Lessnau contacted one another and both knew by that time that employees were walking out at the Romulus plant and both left to go to the Romulus plant to see what could be done about it.

When Frank Klemz arrived, there were some 15 to 17 people standing around the plant gate with 8 or 10 seated in their cars inside the plant parking lot. Klemz stopped at the gate and told the strikers that they were on an illegal strike, were jeopardizing their holiday pay which would only be paid if there was no work stoppage so they would probably not get it, and that they had better get back to work. Some of the strikers spoke up, complaining about various things, such as supervisors working overtime on unit production work which was supposedly prohibited by the previous contract, and having probationary employees work overtime when overtime as an optional item. Complaints were also made about statements Supervisor Colson allegedly made to employees in the shipping area. Around that time Lois Lessnau pulled up and Klemz went into the plant after telling the employees to report in within 15 minutes or leave the premises and the employees discussed the same things with Lessnau. Employees moved their cars outside the plant gate and the one car which had partially blocked the gate was moved. While Lessnau was talking to the employees, Union Representative Hurlbert arrived and the discussion went on and Hurlbert and Lessnau went in for a meeting with Klemz. They discussed the problems mentioned to them by the employees concerning supervisor pro-

duction work and remarks being made by Supervisors Hushen and Colson. They were told that the overtime practice would be stopped and the supervisors would not do unit work, and went out to convey this message to the employees. The employees wanted some further assurances and and Judy Smith went in for a second meeting with the Company. During this second meeting Hurlbert stated that most of the complaints concerned Colson and they would like to confront Colson with them. Colson was called into the meeting and allegations were made that he had said that the employees would not get their insurance and would not get their holiday pay. Klemz stated that Colson may have been referring to the prepared statement which he had issued to be read to the employees and that the statement was not a scare tactic. Colson denied most of the statements attributed to him. They also discussed the previous grievances about supervisor doing unit work on overtime. Klemz stated that if that was causing so much trouble he would stop these practices.

Klemz testified that the practice of supervisors working overtime had been stopped in August when the question was brought up during the negotiation meetings. However, later during his testimony, Klemz acknowledged that both during the week before Labor Day and following Labor Day, a few people had worked in the Romulus solution department to finish up material that was then in process, with the supervisors doing such production work after hours along with probationary employees.

There is a question as to whether the employees wanted to return to work or whether management wanted them to return since it was then afternoon. In any event, it was finally stated that the employees would leave the premises and would return to work the following morning and management would consider not taking any retaliatory measures against them. It was further agreed that the probationary employees then at work would be able to finish the solution then in process and the Union got a truckdriver to load a truck and move a shipment that was needed to be sent. The shipment was moved and following the completion of the processing, the probationary employees left the plant and all the strikers left the area around 2:30 that afternoon.

On the following day all of the strikers returned to work and some of them were given discharge notices which were later

converted into 3-day layoffs. All of the employees who engaged in the strike were given 3-day suspensions and disciplinary warning notices were placed in their personnel files. On the payday following, the Respondent refused to pay the employees who had engaged in the strike the holiday pay that employees felt was due them for Labor Day but did pay holiday pay to all its other employees. On September 10, as stated above, the new contract was ratified by the employees.

Grievances were filed on September 19 and September 21, regarding the denial of holiday pay for the employees at the Romulus plant. Supervisor Hushen responded to the grievance, "No contract no violation." Supervisor Colson, on September 21, responded to the grievance, "No contract in existence. Grievance is out of order and denied." To both of these grievances at the third step, Frank Klemz responded as follows:

> As discussed in the Step III Meeting on 09-25-73, this grievance has no legal basis as there was no contract in effect on 09-04-73 when this alleged violation took place. The Company offered to extend the contract while negotiations continued; the Union refused.
>
> Also the employees were informed on 09-04-73 there would be business as usual as long as there was no work stoppage and normal conduct. The employees were told also if they caused no problems we will continue to work as usual. Holiday Pay would be paid after a new Agreement is ratified if there was no work stoppage. A Wildcat strike occurred on 09-06-73; therefore the employees who participated were informed that they had lost their Holiday pay.
>
> The employees were forewarned and knew the consequences of their action, therefore they were fairly treated.
>
> Finally, since no contract was in effect and the employees were forewarned, this grievance is out of order and denied.

In his testimony when asked why the employees were denied their holiday pay, Klemz replied:

> "We were under the assumption that we would operate differently during that time than we operated under the contract. We thought we had some latitude in that area, and that we could either pay or not pay, the holiday pay as negotiated by the union in the final settlement of the contract.—."

B.

Positions of the Parties and Analysis

The Company takes the position that the issues set forth in the Complaint are such that they should be taken to binding arbitration and requests a deferral for arbitration. If that motion is denied, the Company takes the position that the Complaint must be dismissed since it feels the wildcat strike, violated a no-strike extension agreement that it had negotiated with the Union on August 31 and that such agreement made the strike an unprotected activity, giving the Employer freedom to discipline the employees for engaging in unprotected activities. Respondent cites the *Arundel Corporation*, 210 NLRB No. 93, as being identical to the present situation.

It is the General Counsel's position that the case cannot be "Collyerized" because there was no contract in existence at the time that the strike took place and in the absence of a contract, an arbitrator would have nothing to construe. Respondent argues that the Union and the Company could stipulate to a particular contract being in effect at the time or that certain contract terms would govern the situation, but this would negate the issue as to whether a contract was in existence which governed the conduct of the parties at that time. It is further the General Counsel's position that the action taken by the strikers was not in derogation of the Union's position as bargaining agent and was not an illegal activity and therefore that it is violative of the Act for the Company to take retaliatory action for the employees engaging in a concerted activities strike. In regard to the holiday pay, it is the General Counsel's contention that payment of holiday pay to employees who did not engage in the strike, while refusing to pay those who did strike, is a discriminatory action towards those employees who engaged in concerted activities.

On the question of whether there was an extension of the contract's no-strike clause, it is clear from the evidence that there was no contract extension. Respondent's statements regarding

the filed grievances and its other admissions, confirm the fact that there was no contract in existence between September 1 and September 10. If the Union and the Company were to stipulate the proceeding to an arbitrator, they would also have to stipulate that a particular contract covered that time which would be contrary to the facts. The arbitrator would be deciding issues based on the existence of a contract which was not in existence at the relevant time. A synthesis of the testimony demonstrates that at most, the Company was told that they would have adequate notice in case there was a strike called by the Union so that the problem the Company had a number of years ago of raw material and product spoilage would not occur. The Company was told it would have notice because the Union would have to notify its employees of a meeting to consider a strike vote and after a strike vote was taken there would have to be some approval by the International Union before the strike was sanctioned and called and in this manner several days notice would be provided to the Company to take whatever measures it needed to protect itself. Such a statement was particularly germane to the manufacturing process at the Detroit plant where the meat processing, as noted above, takes several days.

It appears from the evidence that neither the setting of a further negotiation meeting nor the statement concerning strike notification was disseminated to the employees in the Romulus plant. Instead, the employees at the Romulus plant were told that they did not have a union and had no representation and were without a contract and whether they received their holiday pay was contingent upon their not having a work stoppage. When the plant steward at Romulus sought to call Union President Lessnau at the Detroit plant to find out when the next negotiation meeting was scheduled, the supervisor apparently refused to allow him to do so and told inquiring employees to get back to work or they would be fired. Later the supervisor did call Mr. Klemz and inquired whether allowing such a call would be proper or not and about that time the employees went out. There apparently was some misunderstanding concerning whether the employees' hospitalization program would continue as it had in the past and this was linked in the employees minds to their situation in working without a contract. The employees at the Romulus plant were also

resentful of the fact that supervisors and probationary employees were working overtime performing unit work in derogation of a contract term and apparently stockpiling the Company's products in case of a strike. Mr. Klemz testified at one point, that overtime production work by supervisors had been stoped in August, but he admitted later in his testimony that supervisors and probationary employees were still doing production work on overtime following the Labor Day holiday.

It seems clear from the recital of the facts above, the lack of knowledge regarding the next negotiation meeting, the fact that supervisors were still doing production work on an overtime basis, and the questions regarding holiday pay and hospitalization contributed to the Romulus employees' unrest and led to the strike on September 6. All these items were discussed by the employees with Klemz when he first appeared at the plant and later with Union President Lessnau and Union Representative Hurlbert and by them with Klemz and Colson in the plant on the later occasion, with Colson being questioned concerning statements allegedly made by him.

I must conclude from these facts that the strike was not in derogation of the Union's status as the bargaining agent but was in furtherance of it as the striking employees then understood the circumstances.[2] There was no contract extension, and though the promise of adequate notice of a strike was bent in this particular,

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2 In *Lee A. Consaul Co., Inc.*, 175 NLRB 547, the Board said:
One of the principal factors the Board has relied on in deciding whether an "unauthorized" strike is protected is whether its objective is in support of, or in opposition to, the objectives of the union. At the same time, we have indicated that a strike might under some circumstances be unprotected, even when its objective is in support of union policies, if it is undertaken in the face of some final action taken by the Union as bargaining representative and has the purpose or effect of exerting pressure to modify that final action. We have also held that express disapproval of the strike by the Union administrative officials does not in itself render the strike unprotected, and that a strike does not lose its protected status because not called in the manner prescribed by union constitutions and bylaws. It seems clear to us that concerted strike action by employees for the purpose of securing increased benefits may not lightly be characterized as "unprotected" activity, subjecting them to peremptory discharge. There is no reason why an employer should have carte blanche in discharging such employees for engaging in such conduct unless the walkout occurred in circumstances which indicate actual prejudice to the integritity of the collective-bargaining relationship.

it was done without knowledge of that promise and with no damage to the materials or products which were then in process at the Romulus plant. As noted above, that promise was meant principally for the main production operations which took place in the Detroit plant. Therefore, I conclude that this cannot be termed an illegal strike. Accordingly, I must conclude that the strike was a protected concerted activity and that Respondent's suspending the strikers and placing disciplinary notices in their personnel files is in derogation of their rights and is therefore an unfair labor practice. Since the holiday pay was paid to the other employees who did not engage in the strike it is discriminatory to deny it to employees because they engaged in protected concerted activities.

Respondent cites the *Arundel Corporation*, 210 N.L.R.B. 93 as being identical to the instant situation, but it is not. In that situation both the General Counsel and the parties agreed that there had been an extension of a no-strike clause, and that is not so in this case. If any blame must be assessed in this case for the strike which took place, it would seem it should be shared equally by the Company and the Union in that the employees were not informed of the schedule for negotiations meetings and the Company apparently determined to treat its employees in a different manner, emphasizing to them that they were without the protection of a union contract. The combination of these two things led to the self-help engaged in by the employees at the Romulus plant.

In summary I find that Respondent violated Section 8(a)(1) and (3) of the Act by its actions in suspending the strikers, placing disciplinary notices in their personnel files, and by refusing to pay them holiday pay for the Labor Day holiday.

III.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section II, and therein found to constitute unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, occurring in connection with Respondent's business operations as set forth above in section I, have a close, intimate and substantial relationship to trade, traffic

and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV.

The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act as follows:

Respondent shall remove and destroy the disciplinary notices placed in the personnel files of the strikers whose names are set forth in Appendix I. Respondent shall also make the strikers whole by payment to each of them of a sum equal to that which each would have earned as wages for the three days that they were suspended and by payment to each of them of the holiday pay due them together with interest at 6 percent per annum to be computed as set forth in *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716. Respondent shall make its payroll and other records available to the Board to facilitate checking the amounts due each striker.

On the basis of the foregoing findings and the entire record, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully suspending its striking employees for three days and placing disciplinary notices in their personnel files and by discriminatorily refusing to pay them their holiday pay because they engaged in protected concerted activities.

RECOMMENDED ORDER[3]

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case considered as a whole, it is recommended that Difco Laboratories, Inc., of Detroit and Romulus, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending its striking employees and placing disciplinary notices in their personnel files and discriminatorily refusing to pay their holiday pay because they engaged in protected concerted activities.

(b) In the same or any similar manner interfering with, restrining or coercing employees in the exercise of rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make the striking employees listed in Appendix A whole for the loss of pay they suffered, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Remove and destroy the disciplinary notices regarding the strike placed in the personnel files of the striking employees.

(c) Post in its Romulus, Michigan plant, copies of the notice attached hereto and marked "Appendix B."[4] Copies of said notice on forms furnished by the Regional Director

3 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the finding, and conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

4 In the event that the Board's Order is enforced by a Judgement of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

for Region 7, shall after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C., August 21, 1974.

/s/JOHN M. DYER

John M. Dyer
Administrative Law Judge

APPENDIX A

1. Florence Antczak
2. Deborah Barnes
3. Robert Boudreau
4. Steven Briesch
5. Maureen Buckner
6. Clarence Burton
7. Patricia Dangler
8. Vivan Dupuy
9. Dora Dyer
10. Vivian Fosgate
11. David Gennero
12. Charlene Hansen
13. Mary Lawrence
14. Raymond Lock
15. Gary Lumbert
16. Stella Lupinski
17. Gene Moore
18. Phyllis Mullinis
19. Robert Peterson
20. Patty Rodrigres
21. Doris Rudolph
22. Joseph Schiros
23. Judith Smith
24. LaRoma Stout
25. Doris Voytovich
26. Albert White
27. Sherry Whitted

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FOLLOWING A TRIAL IN WHICH THE COMPANY, THE UNION, AND THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD PARTICIPATED AND OFFERED EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE ACT. WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO ABIDE BY WHAT WE SAY IN THIS NOTICE.

WE WILL NOT suspend employees or place disciplinary notices in their personnel files or discriminatorily refuse to pay them holiday pay if they engaged in a lawful strike.

WE WILL NOT in the same or any similar manner interfere with, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

DIFCO LABORATORIES, INC.
(Employer)

Dated..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Blvd., Detroit, Michigan 48226 Telephone (313) 226-3200.

Supreme Court, U. S.
FILED
FEB 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-980

In the Supreme Court of the United States

OCTOBER TERM, 1975

DIFCO LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D. C. 20570.

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OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the National Labor Relations Board (Pet. App. 8-26) are reported at 216 NLRB No. 13.

JURISDICTION

The order of the court of appeals (Pet. App. 7) was entered on October 13, 1975. The petition for a writ of certiorari was filed on Monday, January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that the Union did not orally

agree to extend the no-strike clause of the previously expired collective bargaining agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

1. On August 31, 1973, the bargaining agreement between Difco Laboartories, Inc. (the "Company") and Local Union No. 246, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (the "Union"), expired after the employees had refused to ratify a new contract negotiated by the Company and the Union bargaining committee (Pet. App. 14). When Union representatives informed the Company of the vote,

a Company spokesman asked if a strike were imminent, explaining that the Company wanted to avoid the spoilage of products that had occurred during a previous strike (Pet. App. 14; A. 36-37, 55-56).[1] One of the Union representatives stated that, before calling a strike, the Union would have to take a strike vote and get authorization for the strike from the International (*ibid.*). He added that, since the process would begin with a notice to employees of a meeting for the strike vote, the Company would have several days' notice before a strike actually began (*ibid.*).

On Tuesday, September 4, the day after Labor Day, Company representatives read a statement to the employees advising them that, although the Company had been disappointed by their rejection of the contract that had been presented to them, contract negotiations would continue and holiday pay for Labor Day would be paid provided there was no walkout (Pet. App. 15; A. 30-31, 43, 67). However, on Thursday morning, September 6, most of the employees at the Company's Romulus plant walked out after the shipping foreman refused to allow the shop steward to phone the Union president to find out when negotiations were scheduled to begin again (Pet. App. 15-16; A. 43-45, 48-50).[2]

As the employees began to leave the plant, the foreman informed a group of employees that they did not have a union at that time and that if they did not return to work they would be fired (Pet. App. 15-16; A. 43-45, 48-50).

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[1] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2] The Company operates two plants, one in Detroit and the other in Romulus, Michigan. The Union represents the employees at both plants (Pet. App. 13-14).

Later that day, the conditions that had precipitated the strike were resolved (Pet. App. 16-17; A. 32-35, 46, 50-52), but it was agreed that the employees should not return to work until the following morning. The Company also agreed to consider not taking any retaliatory measures against the employees who had participated in the walkout (Pet. App. 17; A. 41, 61). It was further agreed that probationary employees then at work would finish the production of materials in process, and that the Union would get a truckdriver to load and deliver an emergency shipment (Pet. App. 17; A. 35, 52, 61-62, 65). No raw materials or processed products spoiled as a result of the walkout (Pet. App. 17, 22; A. 66).

The following day, Friday, September 7, all of the employees who had participated in the strike were suspended for three days and disciplinary notices were placed in the files of all but three of those employees (Pet. App. 17-18; A. 27, 36). On the next payday, September 14, the Company paid holiday pay only to those employees who had not participated in the strike (Pet. App. 18; A. 30, 35-36). Thereafter, the Company denied all grievances challenging the Company's failure to pay holiday pay to employees who had participated in the strike, asserting that "since no contract was in effect" at the time of the strike, the grievances were "out of order" (Pet. App. 18).[3]

2. The Administrative Law Judge, whose decision and recommended order the Board adopted (Pet. App. 8-10), held that the strike was concerted activity protected by Section 7 of the Act and that the Company therefore had violated Sections 8(a)(1) and (3) by punishing employees who had participated in it (*id.* at 22-23). In rejecting the Company's contention that there had been a verbal extension of the no-strike clause of the previously expired contract, the Administrative Law Judge found that the statements relied upon by the Company merely assured the Company that it would have sufficient notice before a strike occurred to prevent product spoilage and that no spoilage had occurred as a result of the strike at the Romulus plant (Pet. 20-22). The Board therefore ordered the Company to cease and desist its unlawful conduct and to restore to employees who had been disciplined the benefits that had been denied them (*id.* at 8-10, 23-26).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 7).

[3]On September 10, 1973, the parties entered into a new collective agreement, effective that day (Pet. App. 12, 18; A. 29).

ARGUMENT

The only issue presented in this case is whether statements made by a Union representative constituted a verbal extension of the no-strike clause of the previously-expired collective agreement between the Company and the Union. Such an issue does not warrant review by this Court. In any event, the record in this case amply supports the Board's findings that the Union representative had not agreed to an extension of the no-strike clause but had merely explained that, as a practical matter, the Company would have sufficient notice before a strike actually began to prevent spoilage at its plants.[4] In fact, when the one-day strike did take

[4]In *The Arundel Corp.*, 210 NLRB 525, upon which petitioner principally relies (Pet. 4-5), the General Counsel of the Board and the parties had stipulated that the no-strike provision of the expired contract had been extended.

place, the Union cooperated with the Company and prevented any spoilage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

FEBRUARY 1976.

DOJ-1976-02